

Message Text

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FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 5013

INFO AMCONSUL BREMEN

AMCONSUL DUSSELDORF

AMCONSUL FRANKFURT

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AMCONSUL STUTTGART

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E.O. 11652: N/A

TAGS: PGOV, ELAB, GW

SUBJECT: OPINION ON FRG CO-DETERMINATION LEGISLATION
PREPARED FOR AMERICAN CHAMBER OF COMMERCE IN
GERMANY BY FRG INTERNATIONAL LEGAL EXPERT

REF: (A) PFUND/TRIMBLE LETTERS OF JULY 10 AND MARCH 18,
1974; (B) BONN 6261; (C) BONN 6262; (D) BONN
4004

BEGIN SUMMARY: REPRESENTATIVES OF THE AMERICAN CHAMBER
OF COMMERCE IN GERMANY (ACCG) ON SEPTEMBER 10 LEFT WITH
AMBASSADOR HILLENBRAND A LETTER TRANSMITTING TO SECRE-
TARY KISSINGER THE OPINION OF A GERMAN INTERNATIONAL
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LAW EXPERT COMMISSIONED BY THE ACCG WHICH CONCLUDES THAT

PENDING CO-DETERMINATION LEGISLATION WOULD BE AN ENCROACHMENT ON US SHAREHOLDERS' RIGHTS IN AFFECTED FRG SUBSIDIARIES OF US FIRMS IN VIOLATION OF FRG TREATY OBLIGATIONS TO THE US. THIS OPINION ON THE POLITICALLY SENSITIVE ISSUE OF CO-DETERMINATION, SOON TO BE ADOPTED AS THE POSITION OF ACCG, IS BEING CIRCULATED TO US FIRMS WITH GERMAN SUBSIDIARIES AND COULD SOON BECOME AN ISSUE IN US/FRG POLITICAL AND ECONOMIC RELATIONS. THE CHAMBER HAS ASKED THAT WE SUPPORT ITS POSITION WITH THE FRG. CHAMBER PRESIDENT WITH LEGAL ADVISER WOULD LIKE TO VISIT DEPARTMENT LATE SEPTEMBER OR EARLY OCTOBER TO DISCUSS THIS MATTER. REQUEST WASHINGTON REACTION TO WENGLER/ACCG POSITION ASAP, TAKING INTO ACCOUNT ALSO BACKGROUND OF CO-DETERMINATION IN FRG SUMMARIZED HEREIN. END SUMMARY.

1. AT A MEETING WITH AMBASSADOR HILLENBRAND ON SEPTEMBER 10, OTTO SCHOEPPLER, PRESIDENT OF THE ACCG, AND PAUL BAUDLER, THE CHAMBER'S EXECUTIVE DIRECTOR, FORMALLY LEFT COPIES OF THE LEGAL MEMORANDUM ON THE LEGALITY OF PROPOSED FRG CO-DETERMINATION LEGISLATION PREPARED AT THE CHAMBER'S REQUEST BY PROFESSOR WILHELM WENGLER OF THE FREE UNIVERSITY, BERLIN. IN THE LETTER TO THE SECRETARY, SCHOEPPLER SUMMARIZES PROF. WENGLER'S CONCLUSIONS AS FOLLOWS:

(1) THE RIGHT OF AMERICAN SHAREHOLDERS IN COMPANIES OF THE FEDERAL REPUBLIC TO DEMAND THAT MEMBERS OF THE SUPERVISORY BOARD SHOULD CONTINUE TO BE ELECTED UNDER THE REGULATIONS HITHERTO IN FORCE IS A PROPERTY RIGHT PROTECTED AGAINST EXPROPRIATION AND ENCROACHMENT BY THE GERMAN-AMERICAN COMMERCIAL TREATY OF 1954, ESPECIALLY WHEN SEEN IN CONJUNCTION WITH THE MOST-FAVORED-NATION CLAUSE AND TREATIES FOR THE PROTECTION OF INVESTMENTS WHICH THE FEDERAL REPUBLIC CONCLUDED WITH THIRD COUNTRIES.

(2) THE INTRODUCTION OF PARITY CO-DETERMINATION WOULD BE AN ENCROACHMENT ON THE RIGHTS OF AMERICAN SHAREHOLDERS IN VIOLATION OF THE LIMITED OFFICIAL USE

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TREATY.

(3) WHETHER THE INTRODUCTION OF PARITY CODETERMINATION IS ALLOWED OR RECOMMENDED BY THE BASIC LAW OF THE FEDERAL REPUBLIC IS IRRELEVANT TO THE QUESTION OF WHETHER IT IS COMPATIBLE WITH INTERNATIONAL LAW.

2. THE WENGLER MEMORANDUM IN ITS FINAL FORM DELETED SECTION 9 (PP. 40-43) OF THE PREVIOUS DRAFT (POUCHED TO EUR/CE AND EB/IFD/OIA) AND THE DESCRIPTION OF THE INTERNAL GERMAN LEGAL SITUATION IN SECTION 12 OF THAT DRAFT. THE LATTER HAS BEEN INCORPORATED INTO SCHOEPPLER'S LETTER TRANSMITTING THE MEMORANDUM TO THE SECRETARY OF STATE (BEING SENT UNDER COVER OF AIRGRAM TO EUR/CE, L/EB AND EB/IFD/OIA).

3. THE WENGLER MEMORANDUM WAS SUBMITTED TO THE AMBASSADOR FOR THE SECRETARY OF STATE ON BEHALF OF THE CHAMBER PURSUANT TO A DECISION OF ITS BOARD OF DIRECTORS. IT

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FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 5014

INFO AMCONSUL BREMEN

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IS EXPECTED THAT THE WENGLER OPINION WILL BE OFFICIALLY ADOPTED BY THE CHAMBER AS ITS OWN POSITION IN THE NEAR FUTURE. THE DEPARTMENT WILL BE INFORMED ONCE THE EMBASSY HAS BEEN NOTIFIED OF SUCH ACTION.

4. SCHOEPLER INDICATED THAT THE ACCG WAS OF THE VIEW THAT THE CONCEPT OF CO-DETERMINATION SHOULD BE MET HEAD ON BEFORE IT IS ENACTED INTO LAW, RATHER THAN BY THE USE OF AGREEMENTS SEEKING TO GIVE THE HOME FIRM CONTROL OVER ITS SUBSIDIARY AND/OR OTHER MEANS INTENDED TO CIRCUMVENT THE PURPOSE AND EFFECT OF THE LAW. THE ACCG IS PREPARING TO SEND LETTERS TO THE APPROXIMATELY 70 US FIRMS WITH LIMITED OFFICIAL USE

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GERMAN SUBSIDIARIES THAT STAND TO BE AFFECTED BY THE LAW, POINTING OUT THE THREAT TO THEIR FRG SUBSIDIARIES THAT THE CHAMBER SEES IN THE PROPOSED CO-DETERMINATION LEGISLATION AND INVITING THEM TO EXPRESS THEIR CONCERN TO US AND FRG LEGISLATORS AND GOVERNMENT OFFICIALS. THE WENGLER-ACCG LEGAL OPINION IS BEING GIVEN AS A CONFIDENTIAL DOCUMENT TO THOSE FIRMS WHO HELPED TO FINANCE IT. A COPY OF THE OPINION IS ALSO BEING SUBMITTED TO THE FRG FEDERAL CHANCELLERY; HOWEVER, A PLANNED REFERENCE IN THE TRANSMITTAL LETTER TO THE CHANCELLERY TO THE FACT THAT THE OPINION HAS BEEN SUBMITTED TO THE SECRETARY OF STATE AND TO THE AMBASSADOR IS BEING DROPPED. COPIES ARE ALSO BEING GIVEN TO PARLIAMENTARY LEADERS OF THE THREE MAJOR POLITICAL PARTIES.

5. DURING EARLIER DISCUSSION WITH MOREHEAD KENNEDY OF EB/IFD/OIA, IT WAS SUGGESTED THAT SCHOEPLER AND WENGLER VISIT WASHINGTON TO DISCUSS THIS MATTER. THEY ARE ABLE TO BE IN WASHINGTON IN LATE SEPTEMBER OR EARLY OCTOBER AND WOULD LIKE TO MEET WITH INTERESTED OFFICIALS WHO MAY HAVE QUESTIONS CONCERNING THE CONCEPT AND OPERATION OF CO-DETERMINATION AND THE VIEWS EXPRESSED IN THE LEGAL OPINION. WE HAVE BEEN INFORMED THAT WENGLER'S ENGLISH IS GOOD. THE EMBASSY RECOMMENDS THAT THE DEPARTMENT BE PREPARED TO MAKE ARRANGEMENTS FOR SCHOEPLER AND WENGLER TO MEET WITH APPROPRIATE OFFICES AND AGENCIES.

6- SCHOEPLER AND BAUDLER WERE INFORMED THAT PREVIOUSLY RECEIVED SUMMARIES OF THE WENGLER OPINION AND THE LAST DRAFT HAD ALREADY BEEN CONVEYED TO THE ACTION OFFICES IN THE DEPARTMENT (EUR/CE AND L/EB AND EB/IFD/OIA) WHICH WERE IN A MUCH BETTER POSITION THAN THE EMBASSY TO REACH A DECISION ON THE WENGLER-ACCG OPINION, BASED ON THE OVERALL POSITION AND PRACTICE OF THE US IN THE CONTEXT

OF FCN TREATIES CONTAINING MOST-FAVORED-NATION PROVISIONS AND IN THE AREA OF INTERNATIONAL CLAIMS CONCERNING THE QUESTION AT WHAT POINT THE DILUTION BY GENERAL LEGISLATION OF CONTROL IN A US FOREIGN-BASED SUBSIDIARY MAY BECOME OR MAY HAVE BECOME AN EXPROPRIATION OR DEPRIVATION OF PROPERTY GIVING RISE TO AN INTERNATIONAL CLAIM.

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7. DESPITE THE ADMONITION BY THE ACCG TO RECIPIENTS OF THE LEGAL OPINION TO TREAT IT AS A CONFIDENTIAL DOCUMENT, IT IS ASSUMED THAT ITS EXISTENCE AND THE BASIC VIEWS EXPRESSED IN IT WILL BECOME PUBLIC KNOWLEDGE IN THE FRG IN THE NEAR FUTURE. PUBLIC KNOWLEDGE AND DEBATE WILL INEVITABLY AND SOON SUBJECT THE EMBASSY TO QUESTIONS CONCERNING THE POSITION OF THE USG.

8. IT IS IMPORTANT, THEREFORE, THAT THE EMBASSY BE INFORMED IN THE NEAR FUTURE OF AT LEAST THE DEPARTMENT'S PRELIMINARY REACTION TO THIS LEGAL OPINION AND THE VIEWS OF OTHER FEDERAL AGENCIES (COMMERCE, LABOR, SEC, ETC.) WHO MAY HAVE AN INTEREST AND POSSIBLE RESPONSIBILITY IN THIS MATTER. THESE COORDINATED VIEWS ARE ALSO NECESSARY FOR THE EMBASSY'S GUIDANCE IN DEALING WITH THE ACCG AS IT INCREASINGLY SEEKS TO SOLICIT THE EMBASSY'S COOPERATION AND ASSISTANCE IN ITS EFFORTS CONCERNING THIS IMPORTANT AND POLITICALLY SENSITIVE LEGISLATION. THE EMBASSY WOULD APPRECIATE BEING INFORMED BY CABLE WHETHER ANY DEPARTMENT OR OTHER FEDERAL OFFICIALS WISH TO MEET WITH PROF. WENGLER AND SCHOEPLER DURING THEIR VISIT TO THE US IN LATE SEPTEMBER AND EARLY OCTOBER, SO THAT SCHOEPLER MAY BE INFORMED WHOM TO CONTACT IN WASHINGTON.

9. THE FRG GOVERNMENT'S GOAL IN EXTENDING PARITY CO-DETERMINATION, WHICH NOW EXISTS IN THE COAL AND STEEL INDUSTRY, TO LARGE COMPANIES AND OTHER INDUSTRIES, WAS AND IS ONE OF THE TWO CENTRAL REFORM PROJECTS OF THE BRANDT AND THE SCHMIDT GOVERNMENTS, RESPECTIVELY. IN JANUARY 1974, THE SPD AND FDP AGREED ON A COMPROMISE FORMULA IN WHAT THE GOVERNMENT CHARACTERIZED AS AN

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FM AMEMBASSY BONN

TO SECSTATE WASHDC PRIORITY 5015

INFO AMCONSUL BREMEN

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EPOCH-MAKING RESTRUCTURING OF THE RIGHTS IN BUSINESS ENTERPRISES. THE PRINCIPLE OF EQUAL RIGHTS AND EQUAL INFLUENCE TO WHICH WE COMMITTED OURSELVES IN OUR GOVERNMENT PROGRAM WILL BE FULFILLED, THE GOVERNMENT SAID.

10. ALL POLITICAL PARTIES IN GERMANY SUPPORT THE PRINCIPLE OF CO-DETERMINATION BUT FAVOR DIFFERENT MODELS. CO-DETERMINATION AFTER WORLD WAR II WAS REGARDED BY THE GERMANS AS AN ALTERNATIVE TO EITHER PURE CAPITALISM OR SOCIALISM AND BECAME IN THE POST WAR PERIOD ONE OF THE PRINCIPAL FACTORS IN THE INDUSTRIAL RELATIONS STABILITY AND LACK OF LABOR UNREST THAT HAS

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CHARACTERIZED GERMANY'S RAPID ECONOMIC GROWTH SINCE WORLD WAR II. WHEN HE WAS MILITARY GOVERNOR, GENERAL

LUCIUS CLAY ISSUED A STATEMENT (FEBRUARY 1949) ENDORSING THE PRINCIPLE OF MANAGEMENT-LABOR COOPERATION BUT LEAVING CO-DETERMINATION AS AN ISSUE TO BE SETTLED BY THE GERMANS THEMSELVES. THIS CONTINUED TO BE THE US POSITION SUBSEQUENTLY.

11. THE AMERICAN CHAMBER HAS ALREADY BEEN CASTIGATED BY THE TRADE UNIONS, CERTAIN SPD PARLIAMENTARIANS AND GOVERNMENT MEMBERS FOR ITS PUBLICLY EXPRESSED OPPOSITION TO THE CO-DETERMINATION LEGISLATION. WHILE THE CHAMBER IS CERTAINLY NOT ALONE IN ITS OPPOSITION (GERMAN INDUSTRY HAS MADE IT CLEAR THAT IT WILL SEEK RECOURSE TO THE COURTS IF LEGISLATION IS ENACTED ON THE GROUNDS THAT IT IS UNCONSTITUTIONAL), PUBLIC ATTENTION HAS BEEN CONCENTRATED ON FOREIGN ATTITUDES. THE LEGISLATION WILL BE UNDER CONSIDERATION BY BUNDESTAG COMMITTEES BEGINNING IN MID-OCTOBER, A PROCESS WHICH WILL NO DOUBT LEAD TO HEATED DEBATE AND POLITICAL INFIGHTING. WE FIND OURSELVES, THEREFORE, IN A DELICATE SITUATION CAUGHT BETWEEN WHAT MAY BE LEGITIMATE CONCERNS OF IMPORTANT AMERICAN INTERESTS AND ACCUSATIONS OF INVOLVEMENT IN GERMAN DOMESTIC POLITICS. IF WE ARE TO TAKE UP CUDGELS ON BEHALF OF OUR FIRMS, WE SHOULD HAVE A FIRM LEGAL AND POLITICAL BASIS FOR OUR INTERVENTION.

12. THE EMBASSY WILL CONTINUE TO REPORT ON DEVELOPMENTS CONCERNING THE PROPOSED LEGISLATION, INCLUDING ITS URGENCY AND ANY CHANGES IN THE FEDERAL GOVERNMENT'S ATTITUDE AND THAT OF THE POLITICAL PARTIES.
HILLENBRAND

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